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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. FOREST CONLON, Defendant and Appellant.	2d Crim. No. B267560 (Super. Ct. No. 1470771) (Santa Barbara County)

Forest Conlon appeals from judgment after conviction by jury of assault by force likely to produce great bodily injury (Pen. Code, §§ 245, subd. (a)(4), 12022.7, subd. (e);[1] count 2) and two counts of battery (§§ 243, subd. (e)(1), 242; counts 3-4). The jury found Conlon not guilty of battery causing seriously bodily injury (§§ 243, subd. (d), 12022.7, subd. (e)) as charged in count 1, but found him guilty of the lesser included offenses of simple assault and battery (§§ 240, 242). The trial court placed Conlon on five years probation, including 364 days in county jail.

[1] All further statutory references are to the Penal Code, unless otherwise stated.

Conlon contends counts 1-3 should be reversed because the admission of a 911 call into evidence violated his Sixth Amendment right; there was prejudicial error as to several jury instructions; section 12022.7, which defines great bodily injury, is unconstitutional and there was insufficient evidence to support such a finding; and the cumulative effect of errors was prejudicial. Conlon also contends and the Attorney General concedes the conviction for count 1 must be reversed because simple assault and battery are lesser included offenses of counts 2 and 3. We modify the judgment to reverse count 1, and otherwise affirm.

FACTUAL BACKGROUND

Counts 1-3

Conlon and M.J. were in an on-and-off relationship. In June 2013, Conlon called M.J. several times while she was at a bar and during her walk home. As she approached her driveway, she saw Conlon, who was a taxi driver, drive towards her in his taxi cab. She walked past her home towards another street, but he followed her. She told him to leave her alone and threatened to call the police.

M.J. testified that Conlon got out of his cab, grabbed her phone, and went back to his cab. M.J. went into his cab to retrieve her phone, but he threw her phone out the window. When she tried to get out of the cab, he grabbed her purse. M.J. stated that she bruised her hand when she tried to pull her purse back. Then, when she went to pick up her phone, Conlon got out of the cab and punched her nose. M.J. stated that her nose "exploded" with "blood and fluid dripping down."

A man approached M.J. and told Conlon to "stay away." Conlon drove away. The man called 911. He reported

that "some taxi driver beat up like some lady" and drove away. He stated that he was with M.J., who was bleeding. The 911 operator asked for a description of the cab, the cab company, and the taxi driver, and asked which direction the driver went. The operator asked for the caller's name, but the caller refused. At trial, the prosecution played the entire 911 call for the jury.

Officer Eric Rosenberg responded to the 911 call and contacted M.J. He noticed that she had a "large amount of blood coming out from her face," swelling, and blood on her shirt and on the sidewalk. M.J. told Rosenberg that Conlon had called her derogatory names and that they got into an argument after she got out of his cab. Conlon then took three swings at her. She blocked two swings, but the third connected with her nose. She hurt her hand when she deflected a punch.

M.J. was transported to the hospital, where she was diagnosed with a broken nose and a hand contusion. The treating physician testified that "blunt-force trauma" caused the broken nose. Medical records and photographs showing M.J.'s injuries were admitted into evidence.

The Uncharged January 2013 Incident

In January 2013, Conlon went to M.J.'s home around 5:00 a.m. and yelled obscenities at M.J. from outside her home. M.J. went outside to calm Conlon down, but he continued yelling. M.J. called the police.

Officer Gary Gaston responded to the call, but Conlon left before the officer's arrival. While M.J. was being interviewed, Conlon called her cell phone and Gaston answered. Conlon was very angry, yelled at Gaston, and hung up the phone.

The Uncharged August 2013 Incident

Following the June 2013 incident, M.J. obtained a restraining order against Conlon. Two months later, M.J. received about 24 phone calls from Conlon in one evening.

Count 4

In April 2014, Conlon lived with his mother and his 16-year-old half sister, L.D. One morning, L.D. asked Conlon for a ride to school, and he refused. L.D. and Conlon got into an argument, and Conlon began calling her names. Conlon then slapped L.D. on the cheek.

Defense Evidence

Conlon testified that he contacted M.J. in January 2013 because he wanted to get back together. M.J. told him that she was having sex with somebody else, and Conlon started yelling and calling her names. When Conlon called M.J.'s phone and Officer Gaston answered, Conlon thought it was the other man M.J. had been dating.

Conlon called M.J. in June 2013 to reunite after another break up. She told Conlon that she got kicked out of a bar, and he drove his cab to meet her. M.J. was initially friendly, but her mood changed. M.J. pulled her hand back as if she was about to throw her phone at him, but the phone fell out of her hand. He tossed the phone to the side. M.J. became angry and got into the front seat of Conlon's cab. She reached for the key in the ignition and turned it clockwise, which "kept grinding the starter." Conlon got in the cab and struggled with M.J. to try to stop her. He pushed her arms and hands away and "block[ed] her body" from moving into the driver's side of the cab. M.J. flailed around the cab and stuck her fingernails in his wrist. At some point, she grabbed the key and got out of the vehicle, but he

was able to retrieve the key. M.J. then got into the cab a second time and there was another struggle for the key.

Conlon said that his cab had a taxi meter on the dashboard, which had a metal piece with sharp edges. During the struggle, M.J. was up against the meter. He later found blood on the meter and noticed it was loose.

Conlon denied intentionally hurting M.J. He didn't notice any injuries to her face at any time.

Conlon said that on the morning of the April 2013 incident involving L.D., he woke up to his sister yelling loudly and his mother crying. He believed L.D. made his mother cry, and he slapped L.D. on the face "lightly."

DISCUSSION

The 911 Call

Conlon contends the trial court erred in admitting the 911 call because it does not qualify under the spontaneous statement exception to the hearsay rule. (Evid. Code, § 1240.) He also contends the statements were testimonial under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). We disagree with both contentions.

"We review the trial court's determination as to the admissibility of evidence (including the application of the exceptions to the hearsay rule) for abuse of discretion [citations] and the legal question whether admission of the evidence was constitutional de novo [citation]." (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553.)

A spontaneous statement is admissible as an exception to the hearsay rule if: (1) there was "'some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting'"; (2) the utterance

was made before there was time to "'contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance'"; and (3) the utterance relates to "'the circumstance of the occurrence preceding it.'" (*People v. Poggi* (1988) 45 Cal.3d 306, 318 (*Poggi*), citations omitted.)

The trial court correctly admitted the 911 call under the spontaneous statement exception. (Evid. Code, § 1240.) The 911 call was made shortly after the caller witnessed the crime and while he was with M.J., who was bleeding. Lastly, the statements relate to the events the caller had just perceived (i.e, "some taxi driver beat up like some lady"), and the statements were made before there was time to contrive and misrepresent the events.

The trial court also properly found the statements were nontestimonial. In *Crawford*, the United States Supreme Court held the admission of "testimonial" hearsay violates the Sixth Amendment right of confrontation where the declarant is unavailable to testify and the defendant had no prior opportunity to cross-examine the declarant. (*Crawford*, *supra*, 541 U.S. at p. 68.)

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822 (*Davis*).)

In *People v. Corella* (2004) 122 Cal.App.4th 461, 468 (*Corella*), we held that statements made during a 911 call following a domestic violence incident were spontaneous and nontestimonial. We noted that under *Crawford*, testimonial statements require a relatively formal police interrogation where a trial is contemplated. (*Crawford*, *supra*, 541 U.S. at pp. 52-53.) In contrast, "unstructured interaction" such as preliminary questions asked at the scene of a crime shortly after it has occurred, do not rise to the level of an "interrogation." (*Corella*, *supra*, at p. 469; see *Davis*, *supra*, 547 U.S. at p. 827 [initial interview during a 911 call is not normally considered a formal interrogation, but rather designed to describe current circumstances requiring police assistance].) We also noted the difficulty in identifying circumstances in which a spontaneous statement under Evidence Code section 1240 would be testimonial, since the reason for the exception is that the utterance must be made "without reflection or deliberation due to the stress of excitement." (*Corella*, *supra*, at p. 469.) Such statements by nature are not made in contemplation of their testimonial use in a future trial. (*Ibid.*)

Here, the primary purpose of the 911 call was to enable police assistance for an ongoing emergency. (*Davis*, *supra*, 547 U.S. at p. 822.) The call was made shortly after the crime; the caller requested police assistance; Conlon had left the scene and was still at large (see *People v. Brenn* (2007) 152 Cal.App.4th 166, 178 [statements from a stabbing victim to a 911 operator while the defendant was still at large were nontestimonial because the main purpose was to assist the victim]); and the caller was with the injured victim. The statements resulted from an unstructured interaction between the 911 operator and the

caller and consisted of preliminary questions and answers on what the caller had just observed. (*Corella*, *supra*, 122 Cal.App.4th at p. 469.) As in *Corella*, such spontaneous statements were made without reflection, deliberation, or consideration of the testimonial use at a future trial. (*Ibid*.)

Accident Instruction

Conlon claims the trial court erred in refusing to instruct the jury with CALCRIM No. 3404 on an accident defense. There was no error.

At trial, the defense theory was that M.J.'s injuries resulted from a struggle in Conlon's cab when she tried to take his key. The trial court instructed the jury on self-defense/defense of property, but did not instruct the jury on the accident defense.

A trial court's duty to instruct arises only if it appears the defendant is relying on the defense, or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) An accident defense requires a finding that the defendant acted "without the intent required for the crime." (CALCRIM No. 3404; *People v. Anderson* (2011) 51 Cal.4th 989, 996.) Assault requires that a defendant commit an act that, by its nature, would directly and probably result in the application of force to a person. (CALCRIM No. 875.) Battery requires that a defendant willfully and unlawfully touch a person in a harmful and offensive manner. (CALCRIM No. 925.) Assault and battery are general intent crimes requiring that the defendant commit the act willfully or on purpose. (*People v. Williams* (2001) 26 Cal.4th 779, 788; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 (*Lara*).)

Defendant claims the evidence supported both the accident defense and the self-defense theories. However, several courts have found these defenses are inconsistent: self-defense implies an intentional act, not an accidental one. (See *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357-1358; *People v. McCoy* (1984) 150 Cal.App.3d 705, 708-709.) The evidence presented by Conlon does not support an accident defense because it shows that he acted intentionally or purposefully in using force when he tried to defend himself from M.J. Conlon testified that he struggled with M.J., pushed her hands and arms away, and blocked her body to prevent her from grabbing his car key. That Conlon did not intend to hurt M.J. does not make his conduct accidental. An accident defense refers to the act, and not the result. (See *Lara*, *supra*, 44 Cal.App.4th at p. 110.) Because there was no substantial evidence that he did not act willfully, the trial court did not have a duty to give an accident instruction.

Even assuming error, it was harmless. (See *People v. Breverman* (1998) 19 Cal.4th 142, 178 [errors in noncapital cases in failing to instruct on defense theories are reviewed under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)].) The jury was instructed that assault and battery require the prosecution to prove he acted "willingly or on purpose." We presume that the jury understood and followed the instructions. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1336 (*Cline*).) In finding Conlon guilty of assault and battery, the jury resolved the question of whether defendant acted purposefully or accidentally in committing these crimes. Therefore, it is not reasonably probable that Conlon would have received a more favorable result had an accident instruction been given. (*Watson*, *supra*, at p. 836.)

CALCRIM No. 375

Conlon contends the trial court erred in instructing the jury with CALCRIM No. 375, which pertains to evidence of uncharged conduct. Conlon claims that evidence of his uncharged conduct was not relevant to prove a plan or motive to commit the charged offenses. We disagree.

CALCRIM No. 375 instructs the jury on evidence admitted under Evidence Code section 1101. That section prohibits the admission of evidence of a defendant's prior uncharged misconduct to show he committed the current offense, but it allows such evidence to show the defendant's plan/common scheme, motive, or absence of mistake or accident. (Evid. Code, § 1101, subds. (a), (b).)

Evidence of uncharged acts is admissible to prove motive and intent when it is "sufficiently similar" to support the inference that the defendant ""probably harbor[ed]"" the same intent or motive in each instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*), citations omitted, superseded on other grounds by statute as stated in *People v. Ranlet* (2016) 1 Cal.App.5th 363.)

A "greater degree of similarity" is required to prove the existence of a common design or plan. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.) The evidence must demonstrate "'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.]" (*Ibid.*) The crimes do not need to be identical. (*People v. Jones* (2013) 57 Cal.4th 899, 931; *People v. Carter* (2005) 36 Cal.4th 1114, 1149 [common features should

indicate "'a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual'"].)

Conlon's uncharged acts were properly admitted to show his common plan/design, motive, and intent. The uncharged acts shared common features and were sufficiently similar to the charged crimes. In the January 2013 incident, Conlon went to M.J.'s home, began yelling obscenities, and ignored her requests to stop. In the August 2013 incident, Conlon called M.J. 24 times in one evening, despite a restraining order against him. These prior acts involve a pattern of harassing behavior similar to the charged crimes, where Conlon drove to M.J.'s home, followed her in his cab, and ignored her requests to stop. Additionally the January 2013 incident is similar in that Conlon became very angry after being confronted by his victim, resorted to yelling and calling the victim names, and was unable to calm down.

The probative value of the uncharged acts was not outweighed by the risk of undue prejudice under Evidence Code section 352. (*Ewoldt*, *supra*, 7 Cal.4th at p. 404.) The evidence was especially probative in light of Conlon's self-defense/defense of property argument and his claim that he never intended to hurt M.J. And the evidence was not unduly prejudicial, as the uncharged acts were far less serious than the charged crimes.

CALCRIM No. 852

Conlon claims that the trial court erred in instructing on CALCRIM No. 852, which also relates to evidence of his uncharged acts. He contends that the uncharged acts were not similar to the charged acts of domestic violence and were irrelevant to prove propensity. We disagree.

CALCRIM No. 852 instructs the jury on propensity evidence admitted under Evidence Code section 1109. This section provides: "[i]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code] Section 1101 if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, § 1109, subd. (a)(1); *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138 (*Poplar*).) Unlike evidence admitted under Evidence Code section 1101, under Evidence Code section 1109 there is no threshold requirement to show similarity between the prior acts and uncharged crime for admissibility. (Cf. *People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.) The admissibility of evidence of domestic violence is reviewed for an abuse of discretion. (*Poplar*, *supra*, at p. 1138.)

The trial court properly admitted and instructed on the evidence of the uncharged acts. The uncharged acts constitute evidence of domestic violence. (See *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1144.) As discussed, the probative value of the uncharged acts outweighs their prejudicial value under Evidence Code section 352. The evidence was properly admitted to show Conlon had a propensity to commit acts of domestic abuse. In any event, any instructional error was harmless for the reasons we have discussed. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

We also reject Conlon's claim that Evidence Code section 1109 is unconstitutional on its face and violates his due process and equal protection rights. California appellate courts have consistently held that this section is constitutional. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310 ["the

constitutionality of [Evidence Code] section 1109 under the due process clauses of the federal and state constitutions has now been settled"].)

CALCRIM No. 316

Conlon claims that his due process rights were violated when the trial court instructed the jury on CALCRIM No. 316, which provides: "If you find that a witness has committed a crime or other misconduct, you may consider that fact [only] in evaluating the credibility of the witness's testimony." He claims the instruction allowed the jury to consider evidence of uncharged misconduct in evaluating his credibility as a witness. This claim is forfeited and, in any event, it is without merit.

Conlon did not object to CALCRIM No. 316 at any point during the proceedings below. Conlon contends that the error violated due process and is thus "not the type of error that must be preserved for review" (§ 1259). However, the gravamen of Conlon's claim relates to the clarity of the instruction. He claims that CALCRIM No. 316 was "broadly worded to apply to all witnesses," including Conlon, who testified on his own behalf. If an instruction is correct in law and the defendant failed to request a clarification, the failure to object generally forfeits the issue. (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

Notwithstanding forfeiture, we reject the claim on its merits. "In reviewing the purportedly erroneous instructions, '"we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 957 (*Frye*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 420.)

When the trial court instructed the jury on CALCRIM Nos. 375 and 852, it explicitly instructed the jury that it may not "consider this evidence for any other purpose" other than what was specified in the respective instructions. The trial court also instructed the jury as follows: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other." (CALCRIM No. 303.) We presume the jury understood and followed these limiting instructions. (*Cline*, *supra*, 60 Cal.App.4th at p. 1336.)

Section 12022.7

Conlon claims count 2 should be reversed because section 12022.7, which defines great bodily injury as "a significant or substantial physical injury," is unconstitutionally vague on its face and as applied to him. (§ 12022.7, subd. (f).) Conlon also claims there is insufficient evidence to support the jury's finding on this enhancement. We disagree with both contentions.

Facial challenges to section 12022.7 were rejected in *People v. Guest* (1986) 181 Cal.App.3d 809, 812 ("'We are persuaded by the long acceptance of "great bodily injury" as a term commonly understandable to jurors that it has not acquired a technical legal definition requiring in the absence of special circumstances a clarifying instruction'") and *People v. Maciel* (2003) 113 Cal.App.4th 679, 686 ("'great bodily injury' standing alone is not vague. 'The term . . . has been used in the law of California for over a century without further definition and the courts have consistently held that it is not a technical term that requires further elaboration'"). We follow these precedents.

We also reject Conlon's as-applied challenge and his claim there was insufficient evidence M.J. suffered great bodily injury. "[W]hether a victim has suffered physical harm amounting to great bodily injury is not a question of law for the court but a factual inquiry to be resolved by the jury. [Citations.] "'A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description.'" [Citations.] Where to draw that line is for the jury to decide." (*People v. Cross* (2008) 45 Cal.4th 58, 64.)

Here, the jury properly found M.J. suffered great bodily injury based on substantial evidence. Evidence of broken bones, bleeding, and bruising can be sufficient for a finding of great bodily injury. (See *People v. Nava* (1989) 207 Cal.App.3d 1490, 1499 [jury "could very easily" have found a broken nose as great bodily injury]; see also *People v. Escobar* (1992) 3 Cal.4th 740, 752 (*Escobar*) [bruises, scrapes, stiff neck, and sore vagina]; *People v. Guilford* (2014) 228 Cal.App.4th 651, 661 [broken nose, bruised chin, swelling, red fingerprints on neck, and old injuries]; *Escobar*, at pp. 746-747 [great bodily injury is "a substantial injury *beyond* that inherent in the offense itself"].)

Lesser Included Offenses

Conlon contends and the Attorney General concedes that the conviction on count 1 for simple assault (§ 240) and battery (§ 242) should be reversed because they are lesser included offenses of counts 2 and 3, assault by force likely to produce great bodily injury (§ 245, subd. (a)(4)) and domestic battery (§ 243, subd. (e)(1)). A defendant may not be convicted of both a greater and a lesser included offense. (*People v. Medina* (2007) 41 Cal.4th 685, 701-702.) We reverse the conviction on count 1 for simple assault and battery. (*Ibid.*)

DISPOSITION

The conviction for count 1 for simple battery and assault is reversed. We direct the superior court clerk to amend the abstract of judgment accordingly and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Rick S. Brown, Judge

Superior Court County of Santa Barbara

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

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